Office - Supreme Court, U.S.
FILED
MAY 10 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1413

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH C. LEMIRE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MARGARET I. MILLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming petitioners' convictions when it concluded that a jury instruction setting forth one of the government's theories of fraud was improper, but that there was no substantial possibility that the jury had rested its verdict on that theory.

2. Whether the district court acted lawfully in imposing restitution orders as part of the sentences imposed on petitioners Stephens and Achuck.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 7

Conclusion 14

TABLE OF AUTHORITIES

Cases:

Berenyi v. *Immigration Director*, 385 U.S. 630 13

Chiarella v. *United States*, 445 U.S. 222 8

Cupp v. *Naughten*, 414 U.S. 141 9

Phillips v. *United States*, 679 F.2d 192 11

Street v. *New York*, 394 U.S. 576 8

Stromberg v. *California*, 283 U.S. 359 7

United States v. *Brown*, 699 F.2d 704 12

United States v. *Davies*, 683 F.2d 1052 ..... 11, 12, 13

United States v. *Johnson*, 700 F.2d 699 .... 11, 12

United States v. *Landay*, 513 F.2d 306 11

United States v. *Lynch*, 699 F.2d 839 12

United States v. *McMichael*, 699 F.2d 193 ..... 12, 13

United States v. *Orr*, 691 F.2d 431 11-12

United States v. *Park*, 421 U.S. 658 9

Page

Cases—Continued:

United States v. *Reliable Transfer Co.*, 421 U.S. 397 13

United States v. *Roberts*, 619 F.2d 1 12

United States v. *Taylor*, 305 F.2d 183, cert. denied, 371 U.S. 894 12

United States v. *Tiler*, 602 F.2d 30 12

Zant v. *Stephens*, No. 81-89 (June 22, 1983) 8

Statutes and rule:

Probation Act, ch. 521, 43 Stat. 1259, 18 U.S.C. 3651 ..... 11, 13

18 U.S.C 371 2

18 U.S.C. 1343 1

18 U.S.C. 2314 1-2

18 U.S.C. 3579 *et. seq.* 11

Fed. R. Crim. P. 30 9

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1413

JOSEPH C. LEMIRE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 720 F.2d 1327.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1983. A petition for rehearing was denied on January 11, 1984 (Pet. App. 52a). The petition for a writ of certiorari was filed on February 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, each petitioner was convicted on four counts of wire fraud, in violation of 18 U.S.C. 1343 (Counts 1, 3, 4, and 5), one count of interstate transportation of a security taken by fraud, in violation of 18 U.S.C.

2314 (Count 2), and one count of conspiracy, in violation of 18 U.S.C. 371 (Count 7).[1]

Petitioner Lemire was sentenced to concurrent terms of five years' imprisonment on each count and to a total of $19,000 in fines. Petitioner Stephens was sentenced to concurrent terms of five years' imprisonment on Counts 1, 3, 4, 5, and 7, and to a total of $19,000 in fines. Stephens was sentenced on Count 2 to a term of five years' imprisonment, suspended in favor of probation conditioned on payment of $1,000,000 in restitution to the victim of the fraud. Petitioner Achuck was sentenced to six concurrent five-year terms of imprisonment, all of which were suspended in favor of probation, conditioned on performance of 300 hours of community service and payment of $750,000 in restitution to the victim of the fraud. Achuck was also sentenced to a total of $19,000 in fines. Petitioner Interconex, Inc. was fined a total of $24,000.

1. The evidence at trial showed that petitioners devised a scheme to defraud the Raytheon Company by, inter alia, diverting over two million dollars of company funds to their own accounts in connection with contracts for the shipment of modular homes to Saudi Arabia. Petitioner Lemire was the manager of the Raytheon subsidiary that was responsible for procurement and shipment of the housing to Saudi Arabia. Petitioners Stephens and Achuck were co-owners of petitioner Interconex, a freight forwarding company based in New York. Pet. App. 3a-4a.

In 1976, in connection with a contract to construct a missile system for Saudi Arabia, Raytheon agreed to provide housing for its personnel stationed in Saudi Arabia.

---

[1]Count 6 was dismissed on the government's motion at the close of its case (Tr. 2060-2061).

Although Raytheon previously had used Interconex for some of its shipping to Saudi Arabia, by 1976 Raytheon had a policy of requiring all divisions to use Behring International for freight forwarding and prohibiting use of Interconex, either directly or through subcontracts. Pet. App. 4a; Tr. 771, 1133-1135, 1215; Gov't Exh. 136(c). Raytheon also had an agreement with the Waterman Steamship Line to provide transportation for small amounts of Raytheon goods to Saudi Arabia at a rate of $164.50 per ton (Pet. App. 4a; Tr. 1135-1136, 1154). That agreement did not require Raytheon to use Waterman exclusively (Tr. 1177-1178).

During this period, Raytheon had a policy prohibiting employees from accepting items of value from any organization that supplied, or sought to supply, goods or services to Raytheon. Lemire signed a card each year, including 1976, representing that he had complied with this conflict of interest policy. The policy required employees to report any conflict of interest that arose after cards were signed. Another Raytheon policy required that all competing bidders for Raytheon contracts be given the same bidding information at the same time. Pet. App. 4a.

In late May of 1976, Lemire directed his assistant to ask International Modular Systems, Ltd. (IMS) to make a proposal for the sale and transportation of 220 modular homes to Saudi Arabia. On June 7, Stephens met with IMS representatives to discuss the Raytheon housing project and advised them that Interconex was already providing shipping services for Raytheon. Stephens urged an arrangement under which IMS would provide the housing for the Raytheon project and Interconex would provide the transportation; he suggested that IMS would get additional Raytheon business as a result. When the IMS representatives accepted a written proposal, Stephens informed them that the cost of

transportation would be between $20 and $22 per square foot. One of the IMS representatives noted that Stephens' estimate appeared to be much higher than estimates IMS had received from other companies, but Stephens replied that he was confident that IMS would win the contract, even at the shipping rate he was quoting. Pet. App. 4a-5a; Tr. 191, 199-204, 206-208, 211-213, 369, 376, 378-379, 751; Gov't Exh. 8.

On June 9, Lemire provided an IMS representative with most of the bid specifications for the housing contract. At a June 21 meeting Lemire urged IMS representatives to use Interconex for shipping and stated that Raytheon and Interconex had a continuing business relationship. On the same day Lemire's assistant advised modular house manufacturers of the housing contract and requested bids, which were to include shipping costs, within two days, *i.e.*, by June 23. Lemire subsequently awarded the contract to IMS, which had submitted the lowest bid. When another Raytheon official questioned Lemire's decision to have manufacturers include shipping in their bids, Lemire responded that he believed this approach would save money for Raytheon. Pet. App. 5a; Tr. 216-217, 220-221, 223, 225, 228, 469, 591-592, 764, 928, 930; Gov't Exh. 14(a), 17; Gov't Exh. 22, at 4.

IMS and Interconex then entered into a subcontract for transportation of 220 houses. Although IMS had quoted a transportation price of $20.50 per square foot as part of the bid it submitted to Raytheon, the subcontract provided that IMS would pay Interconex only $12.65 per square foot. The remaining $7.85 per square foot was to be paid by separate check to Generation Holdings, a Liberian company controlled by Achuck. Stephens advised IMS that it should not make any reference to Generation Holdings in its dealings with Raytheon. Pet. App. 5a-6a; Tr. 255, 257-258, 261-264, 283, 381-382, 454; Gov't Exh. GH5, 20.

Later in the summer of 1976 Raytheon awarded IMS another contract for housing units, based on a bid including a quotation of $23 per square foot for transportation costs — a figure used at Stephens' request. In connection with the second contract, IMS agreed to pay $12.65 per square foot to Interconex and $10.35 per square foot to Generation Holdings. Some of the funds paid to Generation Holdings eventually were funnelled to other offshore companies controlled by petitioners and Roy Carver, another Raytheon official.[2] Pet. App. 6a; Tr. 269, 277, 383, 785-787; Gov't Exh. GH6, 15, 16, 39, 40. None of those companies had any offices or employees (Tr. 1396-1397, 1399, 1414-1415, 1425, 1682).

On September 22, following a telephone call from Stephens to IMS, Stephens' attorney picked up a check in the amount of $775,008, made out to Generation Holdings, from the Washington, D.C. office of IMS. IMS subsequently made two wire transfers of $678,240 each to a Generation Holdings bank account in Switzerland, for a total of $2,131,488 out of the $5,264,400 Raytheon paid to IMS for transportation under the two contracts. Approximately half of the amount that went to Generation Holdings was funnelled to a company controlled by Stephens and Achuck, while most of the rest appeared to have been transferred to Lemire and Carver. Pet. App. 6a; Tr. 478, 480, 1432-1437, 1588, 1593, 2028-2029, 2680-2681; Gov't Exh. GH20, GH23, GH29, GH30, CT13-CT15, CT19, Red 19, Red 21-Red 23, Red 27-Red 32, Price 1-Price 2, Price 4-Price 6.

Raytheon began an investigation of the IMS contracts in the fall of 1976. Lemire advised company officials that he did not know who arranged the shipping for IMS. Both

---

[2]Carver was indicted with petitioners. His case was severed from that of petitioners, and he later pleaded guilty. Pet. App. 7a & n.4.

IMS and Interconex refused to provide Raytheon with shipping cost information. Stephens urged IMS not to provide the information and informed IMS representatives that "contacts" within Raytheon had advised them "just to hold tight and that everything would blow over in due course" (Tr. 401). Raytheon directed Interconex to cancel the fourth and final shipment of houses and itself chartered a boat to ship the houses, thus saving approximately $700,000. A Raytheon reviewer concluded that the company appeared to be paying between $600,000 and $900,000 in excess charges on each of the shipments under the two contracts. Pet. App. 6a; Tr. 971, 975, 977, 1066-1067, 1148.

2. The court of appeals affirmed the convictions (Pet. App. 1a-50a). The court of appeals agreed with petitioners' contention that a wire fraud conviction could not rest solely on an employee's intentional failure to disclose a conflict of interest; rather, such a failure to disclose must be "in furtherance of a scheme to defraud Raytheon of a business opportunity or economic benefit" (*id.* at 16a). The court concluded, however, that while a portion of the jury instructions read in isolation might be interpreted to permit a conviction solely on the basis of the failure to disclose Lemire's conflict of interest, the instructions as a whole made clear that the jury was required to find that the scheme involved economic harm to Raytheon. Moreover, the verdict on Count 2, finding petitioners guilty of interstate transportation of a security taken by fraud, indicated that the jury found that Raytheon had suffered economic loss of at least $775,008. The court also noted that the evidence at trial and the arguments of counsel made it "extremely unlikely" (*id.* at 23a) that the jury rested its verdict on the theory of fraud the court had rejected. Since the court found no "substantial possibility" (*id.* at 27a) that petitioners had been convicted on an improper theory of wire fraud, it concluded that any error in the jury instructions could not

have prejudiced petitioners. The court also concluded that there was no material variance between the charges in the indictment and the jury instructions (*id.* at 27a-33a).

The court of appeals also rejected petitioners' challenges to the trial court's evidentiary rulings (Pet. App. 33a-43a), as well as Achuck's claim that there was insufficient evidence to support his conviction (*id.* at 43a-45a). The court held finally (*id.* at 45a-50a) that the restitution orders entered as part of the sentences of Stephens and Achuck were supported by the record and were within the discretion of the district court.

ARGUMENT

1. Petitioners contend (Pet. 10-15) that the court of appeals' failure to reverse their convictions for wire fraud, despite its conclusion that one of the government's theories of fraud was unsound, conflicts with *Stromberg* v. *California*, 283 U.S. 359 (1931), and its progeny. That contention is without merit.

In *Stromberg* the trial court instructed the jury that the defendant could be convicted under any one of three clauses of a statute, one of which subsequently was held unconstitutional. The Court reversed the defendant's conviction, finding itself unable to determine whether the jury had relied on the unconstitutional clause or on one of the other clauses. Petitioners claim that this case is analogous to *Stromberg*, because the jury might have convicted them on the theory the court of appeals rejected (*i.e.*, that petitioners had sought to defraud Raytheon of the loyal and honest services of Lemire and Carver), rather than on the theory approved by the court (that petitioners had sought to defraud Raytheon of a business opportunity or economic benefit).

In fact, the record in this case shows that *Stromberg* is simply inapposite. More recent cases make it quite clear that the rule in *Stromberg* applies only when the reviewing

court is unable to tell from the record whether the verdict rested on an insufficient ground. See, *e.g.*, *Zant* v. *Stephens*, No. 81-89 (June 22, 1983), slip op. 18 ("[t]he cases in which [the *Stromberg*] rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested"). Here the court of appeals was able to determine that the jury convicted petitioners under a proper theory, not under the theory the court rejected. Based on a review of the evidence, arguments of counsel, jury instructions, and verdict, the court concluded that there was no "substantial possibility" (Pet. App. 27a) that the verdict rested on an improper legal theory.[3] Indeed, the court stated (*id.* at 50a) that it was "confident that the jury convicted the defendants only after finding that the defendants' scheme contemplated a pecuniary loss of some kind to Raytheon."

The court of appeals concluded specifically that in light of the context of the trial, including the actual evidence and arguments presented, it was "extremely unlikely" that the jury convicted on the basis of the theory the court rejected

---

[3]Petitioners suggest (Pet. 12 n.13) incorrectly that the decision below is inconsistent with *Street* v. *New York*, 394 U.S. 576 (1969). The Court in *Street* inquired whether "the record negates the possibility" (*id.* at 588) that a conviction was based on unconstitutional grounds. That is essentially the test used by the court of appeals here when it found no "substantial possibility" that the jury relied on the legal theory the court rejected (Pet. App. 27a).

Chiarella v. *United States*, 445 U.S. 222 (1980), cited by petitioners (Pet. 11), is inapposite. In *Chiarella* the Court declined to consider the validity of an alternative theory offered by the government to support the conviction, since the theory had not been presented to the jury. The Court noted that it would have reversed the conviction even if the jury had been instructed in the alternative, in a manner that would make it impossible to tell whether the defendant had been punished for non-criminal conduct. 445 U.S. at 237 n.21. Here, in contrast, the court of appeals was able to determine that the jury did not base its verdict on the theory the court found improper.

(Pet. App. 23a). Petitioners themselves acknowledged in their court of appeals brief that "[t]he evidence introduced by the government during the trial focused on . . . alleged excessive charges" (*ibid.*). In addition, the government's closing argument focused on a scheme to defraud Raytheon of money by overcharging or denying it the opportunity to ship goods more cheaply, with "explicit[] and exclusive[]" reference to receipt of a $2.1 million dollar kickback (*id.* at 23a-24a & n.23). See also *id.* at 7a.

The jury's verdict confirms that it did not rely on the theory of fraud the court of appeals rejected. The jury convicted all petitioners on count two, which charged interstate transportation of a security taken by fraud. In order to do so, the jury must have concluded that the $775,008 check paid to Generation Holdings was "taken by fraud" through operation of petitioners' scheme. As the court of appeals noted (Pet. App. 25a-26a), the conviction on count two therefore carries the necessary implication that the jury found that petitioners defrauded Raytheon of at least $775,008 and that the conviction on the mail fraud counts rested on that finding.

The court of appeals noted (Pet. App. 19a) that one portion of the jury instructions "conceivably" could be interpreted to permit a conviction solely on the basis of petitioners' failure to disclose Lemire's conflict of interest.[4] However, the court concluded correctly that the instructions as a whole do not permit that inference. See, *e.g.*, *United States* v. *Park*, 421 U.S. 658, 674-675 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973). Immediately

---

[4]As the court of appeals noted (Pet. App. 26a), petitioners failed to object to the jury instructions on the ground they now urge. Indeed, they apparently acquiesced explicitly on the point they raise in their petition (*id.* at 26a n.24). Of course, had petitioners expressed their objection at trial, the court would have had the opportunity to clarify the instructions. See Fed. R. Crim. P. 30.

following the instruction at issue, the trial court instructed the jury that more was required to convict petitioners than a breach of their "duty of loyalty" to Raytheon and that such a breach would violate the wire fraud statute only if accompanied by a "material" non-disclosure. Other instructions required the jury to find that petitioners contemplated some "actual harm or injury" and that they had the purpose of causing financial loss to another or bringing about financial gain to themselves (Pet. App. 21a-22a). And in any event, even if the instructions had not made it entirely clear that the jury was required to find that petitioners' scheme involved depriving Raytheon of a substantial sum of money, petitioners could not have suffered prejudice, since the jury's verdict on count two reflects such a finding.[5]

2. Petitioners Stephens and Achuck contend (Pet. 15-21) that the restitution orders imposed by the district court as a condition of their sentences of probation, in the amounts of $1,000,000 and $750,000 respectively, were unlawful. That contention lacks merit.

We note at the outset that petitioner Achuck appears to have waived his right to challenge the restitution order. In a memorandum filed the day before Achuck's sentencing proceeding, his counsel strongly urged a non-custodial sentence. In support of his plea for leniency, Achuck's counsel represented that Achuck would not oppose an order of restitution in any amount the court deemed appropriate: "Consistent with Mr. Achuck's sincere feeling of

---

[5]Petitioners lay particular emphasis on the trial court's reinstruction on the elements of wire fraud. See Pet. 14. However, petitioners called attention to the reinstruction in their court of appeals brief (at 33). The court of appeals nevertheless concluded that it was "confident" that the jury found a scheme involving pecuniary loss to Raytheon (Pet. App. 50a). In view of the ample support for the court's conclusion, it was entirely justified in determining that the reinstruction did not require reversal of petitioners' convictions.

sorrow and remorse, he is fully prepared to make restitution in any amount the court considers appropriate without any challenge whatsoever" (Pet. App. 45a n.37). During the sentencing proceeding, Achuck's counsel reiterated that Achuck was "fully prepared without challenge to assume whatever burden of special costs and restitution you deem appropriate for him. I won't say another word about it. We give you that assurance" (Dec. 16, 1982, Tr. 7).

Of course, the representations made by Achuck's counsel would not constitute a waiver of his right to appeal from his conviction or to challenge a restitution order that bore no relation to the fraud for which he was convicted. Here, however, the indictment charged, and the evidence showed, that Raytheon suffered a loss of more than two million dollars as a result of the fraud. Under these circumstances, Achuck's representations to the district court clearly constitute an adequate basis for the $750,000 restitution order. See *Phillips* v. *United States*, 679 F.2d 192, 194-196 (9th Cir. 1982); *United States* v. *Davies*, 683 F.2d 1052, 1055 (7th Cir. 1982); *United States* v. *Landay*, 513 F.2d 306, 308 (5th Cir. 1975).

In any event, the restitution orders entered against Stephens and Achuck are valid. The Probation Act provides that, as a condition of probation, the defendant may be required "to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." 18 U.S.C. 3651.[6] That provision has been interpreted generally to limit restitution to the losses "flowing from the offense for which the defendant has been convicted." *United States* v. *Johnson*, 700 F.2d 699, 701 (11th Cir. 1983) (citations omitted); *United States* v.

---

[6]A new statute, 18 U.S.C. 3579 *et seq.*, governs the authority of district courts to order restitution in connection with offenses committed after January 1, 1983.

Orr, 691 F.2d 431, 433-434 (9th Cir. 1982). Restitution may be ordered for all damages "directly caused by the illegal activity with which a defendant is charged." *United States* v. *McMichael*, 699 F.2d 193, 195 (4th Cir. 1983).

While a restitution order must be based on the loss flowing from the counts on which the defendant was convicted, it is not necessary that the jury's verdict conclusively establish the size of the loss. Thus, restitution may be ordered in connection with a conspiracy count that alleges a loss to the victim, even though the jury could have convicted without finding that the loss actually occurred. See *United States* v. *Tiler*, 602 F.2d 30, 33-34 (2d Cir. 1979). Likewise, restitution orders are commonly entered following mail or wire fraud convictions, even though the jury need not find that the fraud was actually effected or that the victims suffered a loss as a result of the fraud. See *United States* v. *Roberts*, 619 F.2d 1 (7th Cir. 1979).

Like other sentencing decisions, the task of determining the amount of the victim's loss is left to the discretion of the sentencing court. See *United States* v. *Roberts*, 619 F.2d at 2. See also *United States* v. *Johnson*, 700 F.2d at 701; *United States* v. *Lynch*, 699 F.2d 839, 845-846 (7th Cir. 1982); *United States* v. *McMichael*, 699 F.2d at 194-195; *United States* v. *Davies*, 683 F.2d at 1055. So long as there is an adequate factual basis in the record for the district court's findings as to the size of the loss and the relationship of the loss to the offenses charged in the indictment, the restitution order will be upheld. See *United States* v. *Lynch*, 699 F.2d at 845-846; *United States* v. *Brown*, 699 F.2d 704, 712 (5th Cir. 1983); *United States* v. *McMichael*, 699 F.2d at 195; *United States* v. *Taylor*, 305 F.2d 183, 188 (4th Cir.), cert. denied, 371 U.S. 894 (1962).

Here the district court clearly did not abuse its discretion in imposing the restitution orders on Achuck and Stephens. The wire fraud and conspiracy counts of the indictment

alleged that the diversion of Raytheon funds resulted in payment of a bribe of $1,049,000 to Carver and Lemire and payment of an additional $1,046,000 to Achuck and Stephens. The evidence at trial showed that Raytheon lost between $600,000 and $900,000 per shipment by not itself chartering a boat. In addition, the evidence showed that Generation Holdings received approximately $2,100,000 from its contract with Interconex and that Lemire, Carver, Stephens, and Achuck subsequently shared that amount among themselves. See Pet. App. 49a. The court of appeals correctly concluded (*ibid.*) on the basis of that evidence that the district court could have properly assessed one million dollars each against Achuck and Stephens as " 'the principals of Interconex' " (quoting Stephens Sentencing Tr. 35). That fact-bound conclusion, which provides ample support for the restitution orders, does not warrant further review. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[7]

---

[7]The district court's failure to order full restitution by all petitioners does not render its orders arbitrary. The Probation Act does not require that a restitution order be for the full amount of the loss. See *United States* v. *McMichael*, 699 F.2d at 195. The district court concluded that Stephens and Achuck initially received the benefits of the scheme and were the "real masterminds" (Pet. App. 50a n.40). As the court of appeals noted (*id.* at 49a-50a n.40), the fact that Stephens and Achuck shared part of the proceeds of the fraud with Lemire and Carver did not excuse them from responsibility to make full restitution to Raytheon. See *United States* v. *Davies*, 683 F.2d at 1055. The district court apparently reduced the amount of restitution for Achuck because it considered him less culpable and more penitent than Stephens (Pet. App. 50a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MARGARET I. MILLER
Attorney

MAY 1984

DOJ-1984-05